United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1749

ORIGINAL

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To be argued By:
Michael C. Devine

In The

UNITED STATED COURT OF APPEALS

For The Second Circuit

IRVING GORDON,

Appellant,

vs.

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD, and PHILIPS, APPEL & WALDEN, INC. (sued herein as PHILLIPS, APPEL & WALDEN),

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE, CROSS-APPELLANT ARNOLD LORD

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COUNTER-STATEMENT
OF THE CASE

A. Nature of case.

In August, 1968, plaintiff purchased 4,500 shares of Elpac stock from defendant Burr (6a, 17a). In this action under §10b of the Securities Exchange Act of 1934 plaintiff alleges that 9 different misrepresentations were made to him in connection with his purchase (5a-6a). He alleges that defendant Burr and Lord made the misrepresentations, and that they acted as agents for defendants Elpac, Inc. and Philips, Appel & Walden (5a).

B. Course of proceedings.

The action was tried without a jury in the Southern District of New York in April, 1973. After trial the district court granted plaintiff judgment against defendant Burr, directing rescission. It dismissed the complaint as to all other defendants (53a-54a).

Plaintiff appeals from the judgment and

from the order denying his motion to modify the judgment or grant a new trial (355a). Defendants Lord and Philips, Appel & Walden separately cross-appeal from certain findings which the district court volunteered in its decision (356a-359a).

C. Facts.

Plaintiff is a certified public accountant, who by his own admission speculated in the securities market for a number of years (76a, 163a-166a). In 1968 Howard Mann, a client of plaintiff's, purchased a substantial block of Elpac stock at approximately one-half of the then market price, in a private placement in part arranged by defendant Lord, then a registered representative employed by defendant Philips, Appel & Walden, a securities broker-dealer (225a-226a). Plaintiff knew of Mann's purchase and was told by Mann that Elpac looked promising and appeared to be a very, very good deal (139a-144a, 212a).

In early 1968, at plaintiff's request, Mann sought to arrange, through defendant Lord, a

private purchase of Elpac stock for plaintiff, on terms similar to those which Mann had obtained (143a-145a, 213a-216a). Shortly thereafter, defendant Burr, then President of Elpac and an acquaintance of Lord's, sought to sell approximately 24,500 shares of his Elpac stock in a private transaction, and he so informed Lord (280a-281a).

In June, 1968, a meeting was held in New York, attended by plaintiff, Burr, Lord, Stuart Steinberg, Sr., Stuart Steinberg, Jr., one Adlman (he and Steinberg, Jr. both were registered representatives), one Greenberg, Stanley Jacobson, Esq. (an attorney), and two gentlemen from Philadelphia, whose names plaintiff cannot recall (83a-86a). At the meeting Burr offered a block of approximately 20,000 shares of Elpac stock at $12 per share (87a-88a). Jacobson, the attorney, questioned Burr about the terms and conditions of the proposed sale (85a-87a, 205a-208a). No agreement was reached; no sale contracts were executed (88a-89a).

On July 18, 1968, plaintiff met with Lord, and Lord requested that he sign an information and disclosure form (92a-104a, Exh. 1, 340a-342a) and an investment letter (Exhs. 2, 3; 343a-345a-1). These documents reflect a purchase by plaintiff of 4,500 shares of Elpac stock from Burr at $12 per share. The district court found that at this meeting Lord stated that "everybody" had already signed similar documents (24a, 29a).

Between August 20 and 22, 1968, plaintiff caused $45,000 to be paid to Burr (107a-109a). This constituted full payment for 4,500 shares of Elpac stock, the per share price having been negotiated down from $12 to $10 (152a-153a; Exh. 4, 346a). Although the complaint did not disclose it, at trial it came to light that plaintiff had resold, for $15,000, 1,500 of the shares he was purchasing (4a-9a, 135a-139a). Plaintiff thus breached the express provision of his investment representation prohibiting resale without the consent of the California Commissioner of Corp-

orations (35a).

On August 22, 1968, after payment had been made, plaintiff met with Burr and Lord (109a). The district court found that at this meeting Burr and Lord made a representation about sale of the balance of Burr's 20,000 share block to other persons who had attended the June, 1968 meeting (26a, 29a, 32a, 35a). The decision is not clear as to the precise representation. Burr and Lord denied any such representation (15a, 17a, 282a, 288a-289a).

Defendant Lord did not receive any part of the $45,000 payment; nor did he receive any commission or other compensation in connection with the sale (285a-286a).

Two and one-half years later, in March, 1971, after the market price of Elpac stock began to fall, plaintiff commenced this action (2a). The complaint charged that during the events of mid-1968 defendants Burr and Lord had made 9 separate misrepresentations in connection with the sale of Elpac stock (5a-6a). After trial, the district

court found that 8 of the 9 alleged representations either had not been made or were true (28a). Nevertheless, the district court found that the ninth alleged misrepresentation had been proven, as above described. Therefore judgment was rendered against defendant Burr. The complaint was dismissed against defendant Lord because plaintiff failed to prove any damage, despite a reminder from the court in that regard (46a, 53a-54a).

POINT I

PLAINTIFF ATTEMPTED TO PROVE DAMAGES AND FAILED; HE IS NOT ENTITLED TO A SECOND CHANCE

A. Plaintiff's failure to prove damages.

Plaintiff's complaint claims damages and rescission (9a). At trial the court reminded plaintiff's attorney that proof of damages was required, and plaintiff's attorney stated that he intended to offer such proof.

COURT: ...Do you intend to prove
something in the way of
damages or do you feel you
have done that?
MR. LOEWINTHAN: We will do that,
your honor.
THE COURT: All right.
MR. LOEWINTHAN: Also, we are
asking --
THE COURT: You are asking for a
rescission. I understand
that too.
(128a).

After that colloquy the only evidence of damages which plaintiff offered was a hearsay statement, by a witness not qualified as an expert, as to an over-the-counter quotation on Elpac stock on the day of trial. There was no specification of how many market makers had been checked. The testimony was taken over objection (241a).

Neither the so-called "pink sheets", nor any official quotation, was offered. No proof was offered as to the value of Elpac stock on any date other than the day of trial.

The district court correctly concluded that plaintiff had failed to prove any damage, and plaintiff does not contend to the contrary on this appeal.

> ...no evidence was submitted on the question of damages under any standard by which they might be computed. (Decision below, 42a).

Plaintiff now seeks a second chance to prove that which he failed to prove the first time. A second chance is not ground for a new trial.

> ...a new trial in a court action, will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial. As a practical matter,...., three grounds for a new trial are most commonly known: for manifest error of law or fact, and for newly discovered evidence. (6A Moore, Federal Practice ¶59.07 (2d ed. 1974)).

On this appeal plaintiff argues that a contingent, surety-type rescissional damage remedy should have been granted against defendant Lord, despite the fact that plaintiff never mentioned any such claim or theory until after judgement had been entered. No mention was made in the complaint, at trial, in post-trial memoranda, or

in the proposed counter-judgment.* The district court's decision on plaintiff's post-trial motion meticulously disposes of this after-thought argument (64a-72a). Little can, nor need be, added.

> Thus plaintiff was granted the remedy of rescission exclusively not because he was precluded by the doctrine of election of remedies from seeking damages, but because on the record before me he was not entitled to any damages at all (Decision on post-trial motion. 67a).

Plaintiff relies mainly upon Mack v. Latta, 178 N.Y. 525, 71 N.E. 97 (1904), which holds that, in order to prevent a multiplicity of suits, plaintiff may combine an equitable, rescission and restitution action against one defendant with a legal, damage action against another defendant, upon a showing of probable unenforceability of the equitable remedy. The

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* Thus this theory not only is invalid, but also was offered as an after-thought which, if accepted, would have surprised defendants prejudicially, in that no defendant claimed over against Burr, the sole recipient of plaintiff's payment.

damage remedy would be contingent, standing as security for performance of the rescissional remedy.

Thus Mack fails to support plaintiff's argument. First, plaintiff did not prove unenforceability of the equitable remedy. Alexander City Bank v. Equitable Trust Co., 233 App. Div. 24, 227 N.Y.S. 403 (1st Dept. 1928).

Second, and most compelling, Mack stands for the proposition which defendants urge, and have urged throughout; namely, that plaintiff must prove damage. Whether damages and rescission can be sought in the same action, and whether damages at law are to be a primary or contingent remedy, are academic questions on this appeal for they assume proof of damages, which of course is lacking in the present case. In other words, Mack holds that rescission and restitution can not be awarded against defendants who are not parties to the contract, although damages at law may be, if proven.

Greeley Arcade, Inc. v. Rothenberg, 105

F.Supp. 489 (D. Mass. 1952) is to the same effect.

> Since it appears that the defendant Bergson was not a party to the contract, an action for rescission cannot be maintained against him and his motion for judgment on the first count is allowed. (p. 490).

Jacoby v. Duncan, 138 Misc. 777, 247 N.Y.S. 318 (Sup. N.Y. 1931) enunciates the rule precisely. After a contract based upon a misrepresentation has been rescinded, the party to whom the misrepresentation was made may recover his consideration from the other party to the contract, but not from third parties. He may seek damages at law from such third parties if he proves common law fraud or deceit, as well as damages. The two causes of action may be consolidated in one lawsuit. Thus in this case joinder of the causes of action was proper, but failure to prove damages mandated dismissal of the legal claim.

In addition, plaintiff neglected to act vigilantly in commencing this action. He waited two and one-half years after the date upon which

he should have discovered the alleged misrepresentation. Rescission thus is barred by the doctrine of laches. Baumel v. Rosen, 412 F.2d 571 (4th Cir. 1969), cert. denied, 396 U.S. 1037 (1970).

Finally, rescission and restitution is an equitable remedy, which the trial court may award in its discretion. Its declination to award it here against defendant Lord was consistent with the above-referenced authority, and was not an abuse of discretion.

B. The district court's refusal to grant a new trial or modify its decision.

The granting of a new trial under FRCP Rule 59(a) is a matter of discretion with the trial court. Diapulse Corporation of America v. Birtcher Corporation, 362 F.2d 736 (2d Cir. 1966).

The district court declined to grant a new trial, stating:

> Plaintiff had ample opportunity to submit proof of damages at the trial; indeed, at one juncture (Tr. 56) I pointedly inquired whether he intended to offer such proof. (68a-69a).

The court did not abuse its discretion, and absent abuse its ruling cannot be reversed on appeal. International Bureau v. Bethleham Steel Co., 192 F.2d 304 (2d Cir. 1951).

Plaintiff's post-trial motion also sought modification of the decision pursuant to FRCP Rule 60(b), asserting that plaintiff's attorney may have misunderstood the applicable law by relying upon Mack v. Latta, supra (appellant's brief, p. 36; also 58a-59a). Such a misunderstanding would not constitute mistake or excusable neglect within the meaning of the rule. In any event, if plaintiff's attorney relied upon the Mack case he could not have misunderstood the law because that case is consistent with the result reached by the district court. As discussed above, it holds that plaintiff may combine his equitable, rescission action with his legal, damage action. Plaintiff did just that, except he failed to prove damages. There was no misunderstanding as to the applicability of Mack, only a failure to make the proof of damages re-

quired by that case and many others.

Also the Rule 60(b) motion, like the new trial motion, is addressed to the district court's sound discretion. There was no abuse of that discretion.

C. Dismissal of the complaint with prejudice.

The district court dismissed the complaint against defendant Lord in accordance with basic principles of res judicata. All elements of plaintiff's claim, as stated in the complaint, were accorded a full trial. The district court found a failure of proof as to one essential element, damages. Dismissal with prejudice thus was mandatory, as the determination was on the merits. The judgment stands as a bar to any subsequent litigation of the same claim.

> ...a valid, final judgment... when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand... (1B Moore, Federal Practice ¶0.405 [1] (2d ed. 1974)).

See also, Lawlor v. National Screen Service Corp.,

349 U.S. 322 (1955).

POINT II

ARNOLD LORD MADE NO STATEMENT TO PLAINTIFF WHICH WAS BOTH FALSE AND MATERIAL, AND THEREFORE THE FINDING OF THE DISTRICT COURT THAT LORD VIOLATED THE FEDERAL SECURITIES LAWS IS ERRONEOUS

A. Plaintiff's failure to prove falsity of the alleged misrepresentations.

Defendant Lo~~r~~d is in agreement with the district court with respect to the necessary elements of plaintiff's case; namely, that Lord made false statements to plaintiff in connection with a sale of securities; that the statements were material; that plaintiff actually relied upon the statements; that such reliance was reasonable; and that plaintiff was damaged as a result of his purchase.*

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* Although plaintiff must prove additional elements, it is these which are at issue on this appeal.

The complaint alleged that defendant Lord had made 9 separate false statements to plaintiff (5a-6a). At trial plaintiff failed to prove 8 of the 9 alleged false statements, and the district court so found (28a). In some instances plaintiff failed to prove the making of the statement, and in others he failed to prove the falsity of the statement.

This virtually complete failure of proof demonstrated the complaint's lack of merit and cast severe doubt on plaintiff's credibility. Nevertheless, the district court found that defendant Lord had made a single false representation. No clear finding was made as to the precise representation. Initially the court formulated it as follows:

> "At the meeting of July 18, 1968 at P.A.W., Gordon was told by Lord that all of the other members of the group had executed the documents then presented to Gordon, and on August 22 both Burr and Lord assured Gordon that other members of the group had effected payment in the same way that Gordon had." (29a) (See also 26a).

At two subsequent points in its decision the court described the representation in the following slightly different terms:

> "As I have already noted, as late as July 18 and August 22 Gordon required the reassurance that the other members of the group had already acted before committing himself to the transaction" (32a).
>
> * * *
>
> "In the meetings of July 18 and August 22, when they told Gordon that others had already subscribed to the Elpac offering, they could not help but realize the falsity of these statements" (35a).

Common to these variant findings is reference to two separate conversations, one on July 18 and the other on August 22. Looking first at the July 18 conversation, defendant Lord was found to have said that "all of the other members of the group had executed the documents then presented to Gordon". The documents referred to were an information and disclosure form and a so-called "investment representation" (Exhs. 1, 2, 3; 340a-345a-1).

Plaintiff did not prove that this statement was false. Indeed he did not attempt to do so. Plaintiff testified that there were 6 potential investors in the "group", excluding himself (84a). Of the 6 he offered only one as a witness at trial, Stuart Steinberg, Jr., and almost unbelievably failed to ask him if he had executed documents similar to those which plaintiff executed on July 18 (235a-242a). Thus proof of falsity is not slim, it is non-existent. Yet the district court concluded that the statement was "demonstrably false" (29a). That conclusion defies the record and thus is clearly erroneous.

With respect to the second conversation, August 22, plaintiff again failed to prove falsity. Here the decision's lack of clarity makes analysis difficult, for in one place Lord is found to have said that "other members of the group had effected payment" (29a), in another place he is found to have said that "other members of the group had already acted" (32a), and in yet another place he is

found to have said that "others had already subscribed" (35a). Thus two things are unclear. First, did the court find that defendant Lord was talking about all other members of the group, or only about some other members? Second, did the court find that defendant Lord said these other members "paid", "acted", or "subscribed"?*

However this uncertainty is resolved, falsity of the statement was not proved. Plaintiff's only witness from the "group", Stuart Steinberg, Jr., testified only that he and his father "did not buy any of this Elpac stock" (239a). No foundation was established as to Mr. Steinberg's knowledge of his father's affairs, and of course "buying" is not the same as "paying", or "acting", or "subscribing". More significantly, other than

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* The complaint is contrary to all of the district court's versions of the misrepresentation. At paragraph 9(b)(5a) it is alleged that each member of the group "was forwarding his check"; that is, was in the act of doing it, or would do it in the future, rather than already had done it, as the court appears to have found.

Mr. Steinberg, no member of the "group" testified, which left plaintiff with no proof that these other members had not paid.

B. <u>The alleged misrepresentations could not have been material</u>.

Assuming *arguendo* that on July 18 defendant Lord stated falsely that other persons who attended the June meeting had signed documents like exhibits 1, 2, and 3, and assuming further that on August 22 defendant Lord stated falsely that these persons had paid for Elpac stock, these statements could not have been material within the meaning of the cases under §10(b) of the Securities Exchange Act of 1934.

The district court was correct in reciting the definition of materiality prescribed in *List v. Fashion Park*, 340 F.2d 457 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965); namely, "whether a reasonable man would attach importance to the fact misrepresented in determining his choice of action in the transaction in question" (29a).

Judged by this objective standard, the statements which defendant Lord was found to have made could not have been material. The following factors compel this conclusion:

(i) Plaintiff admitted that prior to the June, 1968, meeting he was not acquainted with, had not met, and did not know the investment experience or expertise of, the other potential investors present at that meeting (146a-147a). Absent such knowledge it is inconceivable that the decisions of these people would be important to the objective, reasonable investor.

(ii) Even if the other people present at the June, 1968, meeting had not purchased Elpac stock, there would have been no adverse effect upon the market value of the stock, nor upon the operations, earnings, assets, or capitalization of the company. It is these factors, plus the price, terms and conditions of the purchase contracts, which the objective, reasonable investor would consider important. Indeed plaintiff admitted that it was certain terms and conditions of the purchase

which he considered important, not who the purchasers were (150a).

(iii) Assuming arguendo that the objective, reasonable investor considered the existence and identity of other purchasers important, he would have found, in this case, that a highly sophisticated, institutional investor, Diebold Technology Venture Fund, was purchasing 20,000 shares of defendant Burr's stock at $12 per share at the same time that plaintiff was purchasing 4,500 shares at $10 per share (Exh. 7, 353a). Thus it could not have been material that unknown, possibly unsophisticated, individual investors were not purchasing Elpac stock, when a sophisticated, institutional investor was. If material at all, these facts were positive, that is, favorable, in evaluating a possible purchase of Elpac stock. Plaintiff admitted this (142a-143a).

The district court did not explain why, in its judgment, the reasonable investor would have found defendant Lord's alleged statements important, rather it held that the present case is analogous to two others in which material mis-

representations were found; namely, Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); and Moerman v. Zipco, 302 F.Supp. 439 (EDNY 1969), aff'd, 422 F.2d 871 (2d Cir. 1970).

In Moerman a corporate officer-director failed to correct the misleading impression given a prospective purchaser of the corporation's stock that a limited amount of stock would be offered to 6 or 8 investors. In truth a much larger number of shares was sold to over 200 shareholders. The finding of materiality in Moerman was correct, but its facts are not analogous to the facts of the present case.

First, in Moerman the corporation was the seller, and thus the more stock it sold the greater the dilutive effect upon the purchaser (plaintiff). That is, the more stock the corporation sold the smaller the purchaser's share of net worth and dividends. In the present case, the corporation was not the seller, and thus there would not be any dilution, no matter how many shares were sold.

Second, in Moerman an unlawful "public" offering occurred, after the purchaser had been led to believe that a lawful, "private" offering was to be effected. This misrepresentation was material because the corporation in which plaintiff had invested was subjected to liability under federal and state laws as a result of the illegal offering. In the present case no comparable misrepresentation was found. Indeed plaintiff offered an exhibit which proves that the transaction was approved by the California Commissioner of Corporations (Exh. 7, 353a). This document also proves that Burr sold 24,500 shares, precisely the number of shares offered (also the number of shares which defendant Lord stated were sold, according to the district court's findings).

The district court also relied upon Myzel v. Fields, supra. There defendant misrepresented that his brother was "going to get out" [of his interest in the company] because "the company was not going anywhere" and "was going to go bankrupt"

(p. 730). Defendant's brother was a trusted friend and advisor of plaintiff, and plaintiff knew that the brother was very close to the company. "He [the brother] is the one who pushed it so far, I would have thought that if he would get out, I better get out too." (plaintiff's testimony, p. 737). In addition, the defendant failed to disclose that he was purchasing as agent for a corporate insider.

The present case is the reverse situation. The persons at the June, 1968, meeting were not trusted friends and advisors; they were not known to be close to Elpac; and they had not previously demonstrated to plaintiff their investment sagacity with respect to Elpac. Nor in the present case was there a non-disclosure of the true identity of the other party to the transaction. It is these factors which made the misrepresentation in Myzel material. They are absent here; indeed plaintiff admitted that he was not acquainted with the persons at the June, 1968, meeting; that he did not

even know the names of 2 of the 6 present; that he had no prior investment experience with them; and that he did not know their level of investment sagacity with respect to any stock, much less Elpac (146a-147a).

There is an additional critical difference between Myzel and the present case. In Myzel the misrepresentations included statements that the company "was not going anywhere," other than bankrupt. This was represented as the reason the brother was getting out. Such a reason would be important to the reasonable investor. If the misrepresentation had been simply that the brother was getting out, without an explanatory reason, it would not have been important because his "getting out" may well have been due to personal financial needs, or other causes which would have no significance for other shareholders.

In the present case, the misrepresentation found by the district court did not include any explanation of the reasoning of the other

persons present at the June, 1968, meeting. Absent such explanation the statement could not be important to the reasonable investor.

Like the present case, Moerman and Myzel deal generally with misrepresentations about other investors, but in each of those cases there are indispensable factors which raise the misrepresentations to the level of materiality. Those factors are lacking here. In holding that Moerman and Myzel support a finding of materiality the district court erred.

POINT III

PLAINTIFF FAILED TO PROVE CAUSATION IN FACT; AND THEREFORE THE FINDING OF THE DISTRICT COURT THAT LORD VIOLATED THE FEDERAL SECURITIES LAW IS ERRONEOUS

A. Plaintiff's purchase was not caused by any statement of defendant Lord.

Whether reliance must be proved in cases like the present where the gravamen of the alleged offense is a misrepresentation, rather than a non-disclosure, is an open question, as the district court correctly held (31a-32a).* However, whether labeled "reliance" or "causation in fact", plaintiff must prove that but for the alleged statements of defendant Lord he would not have purchased Elpac stock.

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* The district court decision was written before the decision of the Court of Appeals in Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974). However, as Shapiro is a non-disclosure case, the question remains open.

> ...the Rule 10b-5 causation in fact requirement is satisfied by plaintiffs' allegation that they would not have purchased Douglas stock if they had known of the information withheld by defendants. Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 240 (2d Cir. 1974).

Plaintiff would have purchased Elpac stock whether or not other persons present at the June, 1968, meeting signed documents similar to exhibits 1, 2, and 3, and whether or not those persons had paid for their Elpac stock. His testimony demonstrates that his purchase was caused by the following factors:

(i) His friend, client, and financial confidant, Howard Mann, previously had purchased Elpac on similar terms, i.e. at a large discount from market price. Mann had told plaintiff of Elpac's bright prospects. For these reasons plaintiff had decided to make a private purchase of Elpac stock, if such a purchase could be arranged. This decision was made prior to the June, 1968, meeting.

(ii) Plaintiff was purchasing the Elpac stock at approximately one-half of the then market price. At the same time, in another private transaction, a large institutional investor was paying $2 per share more than plaintiff (284a).

(ii) At the June, 1968, meeting plaintiff was impressed with certain facets of the proposed transaction; primarily, that Burr was going to sell a block of approximately 20,000 shares of Elpac stock to a small group of investors, and that permission of the California Commissioner of Corporations was going to be obtained (86a-88a). No injury could possibly have resulted from plaintiff's reliance upon this "format", as he put it (86a), for the conditions were satisfied.

In addition, it was a chronological impossibility for plaintiff to have relied upon any statements made by defendant Lord on August 22, 1968. This is the most telling defense regarding reliance and causation, yet it seems to have been ignored by the district court.

Plaintiff testified that at the June, 1968, meeting he had decided to buy Burr's stock, on the single condition that the corporate and governmental consents be received from California (91a, 133a-134a). Indeed the record supports a conclusion that plaintiff's decision had been made before the June meeting.

In addition, according to plaintiff's own testimony, Burr demanded payment for the stock being sold to plaintiff on or before August 21, 1968 (105a; Exh. 4). In a telephone conversation on August 21, Burr agreed to extend the payment deadline to August 22, 1:00 P.M. California time (107a-108a). On August 21, after obtaining the extension, plaintiff called his New York bank and gave instructions to wire $45,000 to Burr's bank in California (108a). Plaintiff's bank carried out the instructions the next day, August 22, (109a). The August 22 meeting between plaintiff, defendant Lord, and Burr did not occur until "late in the afternoon", after New York banking hours and after 1:00 P.M. California time (109a).

Thus, necessarily, the misrepresentation which the district court found to have been made on August 22 had to have been made, if at all, <u>after plaintiff already had made payment and completed his purchase of Burr's stock</u>. Plaintiff could not have relied upon any statement made after the sale.

B. <u>Reliance could not have been reasonable</u>.

The district court disregarded plaintiff's sophistication, on the ground that reliance must be evaluated objectively, without regard to matters unique to the specific case (32a; 50a, fn. 7). However, subjected to objective evaluation plaintiff's reliance upon any alleged false statement of defendant Lord had to have been unreasonable. Applied to this case the questions would be as follows: First, would the reasonable investor have purchased Elpac stock only if 6 other people whom he did not know, and did not bother to contact, signed form documents like those he was asked

to sign?* Second, would the reasonable investor have refused to purchase Elpac stock if other stock which he had expected these 6 unknowns to purchase actually had been purchased (at a higher price) by a sophisticated institutional investor?

Although the decision below does not discuss these questions, the district court implicitly must have answered them "yes". This was clearly erroneous. The reasonable investor would have been concerned with Elpac's business, management, balance sheet, earnings, and prospects, as well as with the price, terms and conditions of his purchase. He would not be concerned with the decisions of six unknown persons, particularly when those decisions could not possibly effect the business or performance of Elpac, nor the market price of its stock. Whether those persons signed certain mimeographed,

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* The importance of these documents must be evaluated in the light of plaintiff's testimony that he may not have read them (133a).

form documents (exhibits 1, 2, and 3) would be even less important.

Also, the reasonable investor, before relying upon statements made about the investment decisions of other people would have contacted those people, or at least attempted to do so. This is particularly true in this case where the attorney, Mr. Jacobson, was an easily accessible source of information. Yet plaintiff admitted that he made no attempt to contact the attorney or any member of the "group" (200a-202a).

CONCLUSION

Plaintiff's attempt at trial to prove damages, after a reminder from the judge as to the necessity for such proof, was patently insufficient, and the district court so found. Contingent rescission against defendant Lord, who did not receive the benefit of the contract, is an illogical and strikingly unfair after-thought. It does not divert attention from the fact that this appeal simply is an attempt to obtain a second change to

prove damages.

Defendant Lord respectfully requests that the district court judgment appealed from be affirmed.

The district court conclusion that defendant Lord violated the federal securities laws is clearly erroneous. The findings on which that conclusion is founded (namely, falsity, materiality, and reliance or causation) are not supported by the record, nor by the authority cited by the district court.

Defendant Lord respectfully requests reversal of the district court conclusion that he violated the federal securities laws.

Respectfully submitted,

BUTOWSKY, SCHWENKE & DEVINE
Attorneys for Appellee,
Cross-Appellant Lord

Of Counsel:

MICHAEL C. DEVINE

STATE OF NEW YORK
COUNTY OF NEW YORK

RAYMOND McGUIRE being duly sworn deposes and says: On August 22nd, 1974 I served the within ~~record on appeal~~ brief appendix on Rogers & Cooper the attorneys for the respondent by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 60 East 42nd Street New York, New York 10017

Sworn to before me this 22nd day of August, 1974

Raymond McGuire

Rose Bono
ROSE BONO
COMMISSIONER OF DEEDS
CITY OF NEW YORK 2-2130
Certificate filed in New York County
Commission Expires July 1, 1975

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: 8/22/78

Attorney for Def. Jr.

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: Aug 22, 1978

Attorney for Irving Gordon Appellant

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED:

Attorney for

STATE OF NEW YORK
COUNTY OF NEW YORK

RAYMOND being duly sworn deposes and says: On , 19 I served the within record on appeal brief appendix on the attorney for the respondent by leaving mailing three copies thereof at his office located at

Sworn to before me
this day of